IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 598

FREDERIC HENRY,

Petitioner,

v.

LT. GENERAL WALTER BEDELL SMITH, Commanding General, First Army, Fort Jay, New York,

Respondent.

PETITION FOR RE-HEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTION

Petitioner herein files a petition for re-hearing of the order denying a petition for writ of certiorari in this case, entered on May 2, 1949. Said petition is filed in accordance with Rule 33, paragraph 2, of the Rules of the Supreme Court of the United States, effective January 1, 1949.

QUESTIONS PRESENTED

While petitioner contended that jurisdictional requirements set forth in Article of War 8 and Article of War 70 had been violated, there is likewise presented the far

greater question of whether the General Court Martial had any jurisdiction to impose any sentence upon the petitioner.

The petitioner did not get an opportunity to examine or see the proceedings of the Board of Review in this case, until after the original petition for habeas corpus had been filed in the District Court for the Southern District of New York. He based his application for release on violations of Article of War 8 and Article of War 70. However, the petition as framed is broad enough to cover all errors pertaining to jurisdiction (Paragraph 16 Petition for Writ of Habeas Corpus), which were raised before the Board of Review. Inasmuch as the decision of the District Court was favorable to the petitioner, the question of jurisdiction of the offense was not passed upon directly by either the Court of Appeals, Second Circuit, or this court.

The record shows that while the General Court Martial found the defendant guilty of embezzlement, the Board of Review unanimously found that he was not guilty of that offense. Two of the three members held he was guilty of fraudulent conversion, an offense with which he was not charged, and which is not an included offense. One member dissented holding the petitioner was not guilty (Court Martial Record, pages 3-18).

If the dissenting member of the Board was right, then the petitioner has been incarcerated and dismissed from the service without violating any military law whatsoever.

The respondent admits in its return that the finding of the Secretary of the Army is to the effect that the "specification is approved as involves findings that the accused did, at the time and place alleged, fraudulently convert to his own use the silver bullion described, of the value of over Fifty Dollars ($50.00), of the ownership alleged, in violation of Article of War 96."

A Board of Review under the Acts of Congress can find the accused guilty of a lesser offense only if there is a lesser *included* offense. Fraudulent conversion is not a lesser included offense where embezzlement has been charged.

ARGUMENT

I. Board of Review Had No Jurisdiction to Impose Penal Sentence.

It is true that the authority of this court to review court martial judgments does not permit the court to pass on the guilt or innocence of persons convicted by courts martial. *Carter* v. *McClaughry*, 183 U. S. 365, 381; *In re Yamashita*, 327 U. S. 1, 8-9.

However, it is equally true that a sentence for a non existing offense could be challenged on habeas corpus. As pointed out by Justice Clarke in *Collins* v. *McDonald*, 258 U. S. 416, 418, the questions in such proceedings are:

> "Did the court martial which tried and condemned the prisoner have jurisdiction of his person and of the offense charged, and *was the sentence imposed within the scope of its lawful powers.*"

The general rule is well stated in the Naval court martial case of *Ex parte Mulvaney*, 82 Fed. Supp. 743, 745:

> "It is beyond question that a court must have jurisdiction over both the person and the offense in order to render a valid judgment."

We take it this applies to actions of the Board of Review as well as the general court martial itself.

The Board of Review unanimously found that the petitioner was not guilty of embezzlement as the general court martial at Regensberg had found. Had there been one member with any legal training on that Court Martial, as

provided by Article of War 8, it would have had to reach the same result.

Having found the petitioner not guilty of embezzlement, the powers of the Board of Review were definitely prescribed by the Articles of War enacted by Congress.

Article of War 47 (Title 10, Section 1518, U. S. Code) provides:

> "Art. 47 Powers Incident to Power to Approve.—The power to approve the sentence of a court-martial shall be held to include:
>
> (a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of *a lesser included offense* when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and
>
> (b) The power to approve or disapprove the whole or any part of the sentence.
>
> (c) The power to remand a case for rehearing, under the provisions of article 50½."

In other words the power of the Board to substitute a different offense is limited to those cases where there is a *lesser included offense.* Two members of the Board of Review, after the entire Board had found the petitioner not guilty of embezzlement, found the defendant guilty of fraudulent conversion, the third member dissenting.

Fraudulent conversion is not a lesser included offense, and Member Lynch points this out quite specifically (Court Martial Record, pages 17-18).

Embezzlement is a statutory offense. Under army rules it is defined:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." *Manual*

of Courts Martial, page 173. Citing *Moore* v. *United States,* 160 U. S. 268.

Despite a ruling by the Judge Advocate General [*Digest of Opinions J. A. G.* 1912-40 Section 451 (21)] there are no cases found where fraudulent conversion has been held to be included in embezzlement.

If the jury is asked to pass on the offense of embezzlement the verdict must be guilty or not guilty. It cannot be guilty of fraudulent conversion. This is because embezzlement is of a purely statutory nature. See *United States* v. *Smith,* 124 U. S. 325; *Moore* v. *United States,* 160 U. S. 268; *United States* v. *Mason,* 218 U. S. 517; *Tredwell* v. *United States,* 266 Fed. 350; *State* v. *Channer,* 115 Oh. St. 350; 146 L. R. 540 et seq.

We, therefore, contend that since the petitioner was found not guilty of embezzlement, under the provision of Article of War 47, the Board of Review had no jurisdiction to substitute the offense of fraudulent conversion with which petitioner was not charged or placed upon trial. The powers of the Secretary of the Army acting for the President in reference to the sentence were no greater than those of the Board of Review (Article of War 48, 49, Title 10 Section 1519 and 1520, U. S. Code), to confirm a void sentence.

Since there was no jurisdiction to sentence for the offense of fraudulent conversion, petitioner was unlawfully held in custody.

II. Article of War 8

This court denied review even though the decision of the Court of Appeals, Second Circuit, is opposed to the decision in *Brown* v. *Hiatt,* 81 Fed. Supp. 647 (N. D. Ga.), which was based upon and followed *Runkle* v. *United States,* 122 U. S. 543; *McClaughry* v. *Deming,* 186 U. S. 49, 63.

Since there were legal points involving the question whether there was jurisdiction to sentence for a non-existing offense, the importance of having a person with some legal knowledge appointed on a general court martial is specifically demonstrated.

Under the revision of the Articles of War, it is now said that it is expressly made mandatory that a member of the Judge Advocate General's Department or one with legal experience be on a general court martial. The language of Article of War 8 at present is the same as under former Article of War 8, except that the following is omitted "except that when an officer of that department is not available for that purpose, the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

With this exception, we still maintain that former Article of War 8 was mandatory; and there is nothing to show that Colonel Darling, a Cavalry officer, who sat as president and law member, and not, therefore, subject to peremptory challenge, was specially qualified to act as law member. His rulings throughout the trial indicated he was not so qualified.

In other words, while it is now conceded a lawyer must act as law member, there is nothing in the revision of the Articles of War, which by any proper construction would hold that Article of War 8 as formerly written was not mandatory. If the same reasoning and interpretation, namely the comparison of the present and the former language of the Article of War, and the reports of Congress, which was employed in *Humphrey* v. *Smith*, No. 457, is used in interpreting Article of War 8 in the present case, reversal of the judgment of the Court of Appeals of the Second Circuit would follow as a matter of course.

III. Article of War 70

We submit that this court in *Humphrey* v. *Smith,* No. 457, construed Article of War 70 contrary to even the present Congressional intent.

In 1947, the House Committee on Armed Services reported out a bill to amend the Articles of War and said (H. Rep. 1034, 80th Cong., 1st sess., p. 7):

> "4. Should the pre-trial investigation be made mandatory and should accused be furnished counsel at such investigation?
> This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. *Upon this premise we have concluded that an investigation* should precede every general courts-martial trial but *that the investigation should be considered sufficient if it has substantially protected the rights of the accused.* To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds."

Congress felt that Article of War 70 should be substantially complied with by a court martial. This court holds, in *Humphrey* v. *Smith,* that Article of War 70 is not jurisdictional and can be ignored completely. This is not what Congress said in its report.

The court relied on what the Secretary of the Army said, but apparently failed to consider the Congressional report.

CONCLUSION

For the reasons stated petitioner most respectfully urges that this petition for re-hearing be granted.

Respectfully submitted,

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STANLEY A. SILVERSTEEN,

Attorneys for Petitioner.

We the undersigned hereby certify that this petition for re-hearing is filed in good faith, and not for the purposes of delay and is restricted to matters contained in Rule 33, paragraph 2 of the Rules of the Supreme Court of the United States.

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Stanley A. Silversteen